

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

PERFECTO ACEVEDO SANCHEZ,

Defendant.

No. CR-06-2140-FVS-1
CV-09-3011-FVS
CV-09-3016-FVS

ORDER

BEFORE THE COURT are Defendant Perfecto Acevedo Sanchez's ("Defendant's") January 27, 2009, Section 2255 petition (Ct. Rec. 252), Defendant's supplemental Section 2255 petition filed on February 9, 2009 (Ct. Rec. 256), and the Government's February 10, 2009, motion requesting that the Court vacate and reenter the judgment in this case to allow Defendant's appeal period to restart. (Ct. Rec. 257). Defendant is proceeding pro se. The Government is represented by Assistant United States Attorney Jane Kirk.

BACKGROUND

On October 4, 2007, Defendant pleaded guilty, pursuant to a written plea agreement, to counts 1 and 3 of the indictment. (Ct. Rec. 179). The plea agreement contained a waiver of appeal if the Court imposed a sentence of not greater than 210 months. (Ct. Rec. 179 ¶ 18). The plea agreement further contained a waiver of

1 Defendant's right to file any post-conviction motion under 28 U.S.C. §
2 2255, attacking his conviction or sentence, except an appeal based on
3 ineffective assistance of counsel. (Ct. Rec. 179 ¶ 18). On January
4 24, 2008, Defendant was sentenced to a term of imprisonment of 210
5 months. (Ct. Rec. 235). Judgment was entered on February 7, 2008.
6 (Ct. Rec. 243). No direct appeal was taken.

7 DISCUSSION

8 On January 27, 2009, Defendant moved the Court, pursuant to 28
9 U.S.C. § 2255, for an order affording him a direct appeal proceeding,
10 claiming that his counsel failed to file a notice of appeal despite
11 his request to do so. (Ct. Rec. 252). On February 9, 2009, Defendant
12 filed a supplemental Section 2255 petition reiterating ground two of
13 his initial Section 2255 petition. (Ct. Rec. 256).

14 On February 10, 2009, the Government filed a motion requesting
15 that the Court vacate the judgment in this matter and reenter
16 judgment, without an evidentiary hearing, in order to allow Defendant
17 the option of filing a direct appeal. (Ct. Rec. 257). The Government
18 directs the Court's attention to *United States v. Sandoval-Lopez*, 409
19 F.3d 1193, 1198 (9th Cir. 2005) (holding that a defendant is entitled
20 to an evidentiary hearing to determine if his trial counsel failed to
21 file a notice of appeal when so requested). The Ninth Circuit held in
22 *Sandoval-Lopez* that, if the state does not object, the district court
23 can forego a evidentiary hearing, assuming without deciding that the
24 defendant's claim is true, and vacate and reenter the judgment in
25 order to restart the 10-day appeal period. *Id.* at 1198. The
26 Government makes a request for just such a procedure. (Ct. Rec. 257-

2). The Government requests that the Court vacate then reenter judgment to enable the appeal period to restart in this case. (Ct. Rec. 257-2 ¶ 8).

CONCLUSION

The Government's requested procedure is authorized by *Sandoval-Lopez* and appears to be appropriate for this case. Accordingly, the Court being fully advised, **IT IS HEREBY ORDERED** as followed:

1. The Government's February 10, 2009, motion (Ct. Rec. 257) is **GRANTED**.

2. Defendant's January 27, 2009, Section 2255 petition (Ct. Rec. 252) is **DISMISSED WITHOUT PREJUDICE**.

3. Defendant's supplemental Section 2255 petition (Ct. Rec. 256) is **DISMISSED WITHOUT PREJUDICE**.

4. The Clerk shall **vacate** the Court's February 7, 2008 judgment (Ct. Rec. 243) and then **reenter** said judgment in order to allow the direct appeal period to restart.

5. The District Court Executive shall close this file as well as the corresponding civil cases: **CV-09-3011-FVS and CV-09-3016-FVS**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, furnish copies to **DEFENDANT** and counsel for the Government, and **CLOSE THE FILES**.

DATED this 12th day of February, 2009.

S/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge